

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MACY MARIE KUIPERS,

Defendant-Appellant.

UNPUBLISHED

September 27, 2007

No. 271755

Ottawa Circuit Court

LC No. 05-029012-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals by right from her jury trial convictions of three counts of embezzlement of more than \$1,000 but less than \$20,000, MCL 750.174(4)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from her appropriation of store bank deposits on October 16, 18, and 19, 2004, while she was an employee at a Dollar General store in Holland Township. Over defendant's objection, the prosecutor was permitted to introduce the preliminary examination testimony of Selena Koenig, who could not be located for trial. In her preliminary examination testimony, Koenig, who was defendant's neighbor during the time the deposits were taken, stated that she babysat for defendant's children. She testified that on one occasion, she found a Dollar General deposit bag containing checks in defendant's closet. The bag had a deposit slip with defendant's name on it and another slip bearing the name of another employee. However, Koenig testified that she had stopped babysitting defendant's children by the end of September 2004.

On appeal defendant maintains that the trial court erred when it determined that the prosecution used due diligence to locate Koenig before trial. We disagree.

MRE 804(a)(5) requires a showing that the proponent of the evidence exercised due diligence in attempting to procure the missing witness's attendance. See *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). Once that showing is made, the proponent can attempt to show that other evidence (in lieu of the witness's testimony) should be admitted under one of the exceptions listed in MRE 804(b). "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean, supra* at 684 (citations omitted). We review a decision whether the prosecutor exercised due diligence

for a clear abuse of discretion and findings of fact underlying the decision for clear error. *Id.*; *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). An abuse of discretion occurs when the court's decision results in an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Two officers attempted repeatedly to serve subpoenas on Koenig for both scheduled trial dates.¹ But, new tenants had moved into Koenig's apartment and did not know Koenig's new address. An officer went to the post office where he obtained a forwarding address for a P.O. box at a UPS store. A search through the Secretary of State revealed that Koenig had not changed her address on her driver's license. Another officer contacted the UPS store and determined that Koenig no longer received mail at that box and had again left no forwarding address. The officer also checked the officers' "global system" which listed only Koenig's apartment address. The officers and the prosecutor also attempted to call Koenig but, her apartment phone number had been disconnected, and the prosecutor was unable to contact her through the other number or numbers.²

We find that the trial court's determination that the officers used due diligence was not clearly erroneous and did not constitute an abuse of discretion. Defendant testified that Koenig had been on probation and now contends the police should have contacted Koenig's probation officer. But, no record that Koenig was actually a probationer has been presented to this Court. Defendant also faults the police for failing to attempt to locate Koenig's family. However, nothing in the record indicates that Koenig had family, other than her apparently young children, who could be contacted. And while defendant points particularly to efforts taken in other cases, such as holding witnesses in protective custody, and checking jails, morgues, hospitals, or homeless shelters, we disagree with her contention that the officers were required to investigate these additional avenues. See *Bean, supra* at 684 ("The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it."). We further find it telling that defendant, who seems to have known Koenig relatively well, apparently had no idea how to locate her. Thus, under the circumstances, we affirm the trial court's due diligence finding and its decision to allow the prosecutor to present Koenig's preliminary examination testimony at trial.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

¹ The trial, which occurred on December 21, 2005, had been rescheduled from August 2005. Apparently, the police could not locate Koenig for the earlier trial date.

² Defendant testified that she purchased a cell phone for Koenig, but "shut the phone off" after Koenig exceeded her minutes.